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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

Arizona Corporation Commission

DOCKETED

JUN - 8 2009

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AZ CORP COMMISSION
DOCKET CONTROL

IN THE MATTER OF THE APPLICATION OF
THE CITY OF FLAGSTAFF TO UPGRADE
EXISTING RAILROAD CROSSINGS OF THE
BNSF RAILWAY COMPANY AT STEVES
BOULEVARD AND FANNING DRIVE IN THE
CITY OF FLAGSTAFF, COCONINO COUNTY,
ARIZONA, DOT CROSSING NOS. 025099J
AND 025129Y.

DOCKET NO. RR-02635B-09-0075

PROCEDURAL ORDER

BY THE COMMISSION:

On February 19, 2009, the City of Flagstaff ("City") filed with the Arizona Corporation Commission ("Commission") an application for approval to upgrade two existing at-grade railroad crossings of the BNSF Railway Company ("BNSF") by installing additional warning devices in the form of wayside horns, as part of the City's plan to create a New Quiet Zone within the City's limits. The two crossings are at Steves Boulevard, DOT Crossing No. 025099J, and Fanning Drive, DOT Crossing No. 025129Y, both located within the City, in Coconino County, Arizona. The City explained that three additional crossings (Beaver Street, San Francisco Street, and Enterprise Avenue¹) are to be included within the New Quiet Zone, but that no changes will be made to the warning devices, roadway configuration, or pavement markings at those crossings.

On February 27, 2009, a Procedural Order was issued scheduling the hearing in this matter for May 6, 2009, and establishing other procedural requirements and deadlines. Among these was a requirement for the City to provide a copy of the application and Procedural Order, by certified mail, to BNSF, Coconino County, the Arizona Department of Transportation ("ADOT"), and any other municipality or interested person that may be affected by the application.

¹ These crossings are further identified, respectively, by DOT Crossing Nos. 025133N, 025132G, and 025131A.

1 On March 6 and 16, 2009, documents were filed to supplement the City's application.

2 On March 27, 2009, the Commission's Safety Division Staff ("Staff") filed its Staff Report in
3 this matter.

4 On April 6, 2009, the City filed an affidavit of publication showing that notice had been
5 published in the *Arizona Daily Sun* on March 15, 2009, along with certified mail receipts showing
6 that notice had been mailed to BNSF, ADOT, and Coconino County early in March 2009.

7 On April 7, 2009, comments regarding the application were filed by Walter Robertson, a
8 resident of Flagstaff, who raised concerns regarding the safety of the crossings at Beaver Street and
9 San Francisco Street upon implementation of the Quiet Zone.

10 On May 1, 2009, Staff filed a Motion to Continue Administrative Hearing.

11 On May 6, 2009, the hearing in this matter convened before a duly authorized Administrative
12 Law Judge of the Commission at the Commission's offices in Phoenix, Arizona. The City, BNSF,
13 and Staff appeared through counsel. During the proceeding, it was determined that the hearing would
14 be continued for approximately two months to allow Staff additional time to gather and analyze
15 information regarding the alterations to the Steves Boulevard and Fanning Drive crossings; to engage
16 in discussions with the City and BNSF, as appropriate, regarding how to address the issues related to
17 possible completion of the alterations prior to receipt of Commission authorization; and to formulate
18 Staff's recommendations related to those issues. In addition, the City was directed to provide notice
19 to Amtrak, and the City and Staff were directed to file briefs addressing several questions related to
20 the crossings at Beaver Street, San Francisco Street, and Enterprise Avenue.

21 On May 7, 2009, a Procedural Order was issued memorializing the outcome of the hearing on
22 May 6, 2009; establishing the deadline for the briefs; and scheduling the hearing for July 8, 2009.

23 On May 22, 2009, Staff docketed a letter from Staff to the Commissioners stating that the
24 wayside horns appeared to have been installed at both Steves Boulevard and Fanning Drive as of
25 May 1, 2009, although the application in this matter is still pending. Staff added that the wayside
26 horns apparently were not functioning and that the City had removed the wayside horns as of May
27 20, 2009, pending Commission approval of the City's application.

28 On May 27, 2009, the City filed a copy of the notice provided to Amtrak.

1 On May 28, 2009, Mr. Robertson again filed extensive comments.

2 Because the hearing in this matter has been continued, it is appropriate to establish a new
3 deadline for intervention in this matter. In addition, because at least one member of the public
4 appears to be interested in this matter, and there may be confusion regarding how and to what extent
5 one may participate as a public commenter, it is also appropriate to explain the extent to which the
6 Commission can consider comments filed in a docket and the extent to which a member of the public
7 may participate in a proceeding if the person does not request and obtain the status of an intervenor.
8 It is also appropriate to provide information on how a person may obtain intervenor status.

9 Although the Commission will generally consider public comments that have been filed in a
10 matter, to assist in determining what is in the public interest, public comments are not sworn
11 testimony and cannot be relied upon as evidence to establish facts.² If a member of the public desires
12 to have the information presented by that person considered as evidence, as opposed to commentary,
13 or desires to participate in a hearing through the questioning of witnesses, that person must apply to
14 become an intervenor.

15 Any person entitled by law to intervene and having a direct and substantial interest in a matter
16 will be permitted to intervene. The granting of motions to intervene is governed by Arizona
17 Administrative Code R14-3-105. If representation by counsel is required by Rule 31 of the Rules of
18 the Arizona Supreme Court, intervention is conditioned upon the intervenor's obtaining counsel to
19 represent the intervenor. Additional information about requesting intervention is available on the
20 Commission's website at <http://www.azcc.gov/divisions/utilities/forms/interven.pdf>. The granting of
21 intervention, among other things, entitles a person to present sworn evidence at hearing and to cross-
22 examine other witnesses. However, failure to intervene does not preclude any interested person from
23 attending a hearing and providing public comment concerning an application or from filing written
24 comments in a case.

25 IT IS THEREFORE ORDERED that any person who desires to intervene in this matter must
26 file a written motion to intervene with the Commission's Docket Control **no later than June 22,**
27

28 ² See Arizona Administrative Code R14-3-109(Z).

1 **2009.** A copy of the motion to intervene must be sent to all parties of record or their attorneys. A
2 motion to intervene must contain the following:

- 3 1. The person's name, address, and telephone number and the name, address, and
4 telephone number of any person upon whom service of documents is to be made, if
5 not the person applying for intervention;
- 6 2. A short statement of the person's interest in the proceeding (*e.g.*, a customer of BNSF,
7 a railroad directly and substantially affected by the application, a resident of Flagstaff
8 who will be directly and substantially impacted by the crossing alterations, etc.); and
- 9 3. A statement certifying that the person has mailed a copy of the motion to intervene to
10 all parties of record in the case or their attorneys.

11 IT IS FURTHER ORDERED that any objections to a motion to intervene must be **filed by**
12 **July 2, 2009.**

13 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules
14 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission
15 *pro hac vice*.

16 IT IS FURTHER ORDERED that withdrawal of representation must be made in compliance
17 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the
18 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances
19 at all hearings and procedural conferences, as well as all Open Meetings for which the matter is
20 scheduled for discussion, unless counsel has previously been granted permission to withdraw by the
21 Administrative Law Judge or the Commission.

22 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113 - Unauthorized
23 Communications) applies to this proceeding and shall remain in effect until the Commission's
24 Decision in this matter is final and non-appealable.

25 ...

26 ...

27 ...

28 ...

IT IS FURTHER ORDERED that the presiding Administrative Law Judge may rescind, alter, amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

DATED this 8th day of June, 2009.


SARAH N. HARPRING
ADMINISTRATIVE LAW JUDGE

Copies of the foregoing mailed/delivered
this 8th day of June, 2009, to:

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